

**THIRD EELF CONFERENCE**

# **THE EFFECTIVENESS OF ENVIRONMENTAL LAW**

## **Introduction to the Conference's topic**

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# Introduction

- A rapid expansion in the use of law in the service of the environment

 An impressive collection of varied legal instruments aimed at protecting the environment, at the international, regional, national and subnational levels, ranging from treaties to national legislations, constitutional provisions or municipal regulations

- A development which have not always been matched by corresponding improvements in environmental quality

 A steady decline in environmental quality, bringing into sharp focus questions related to the true value of the existing instruments.

# Outline

- 1. The effectiveness of environmental law : A long-neglected issue**
- 2. Effectiveness : What is it?**
- 3. Difficulties in assessing effectiveness**
- 4. How to improve the effectiveness of environmental law ?**

# **1. The effectiveness of environmental law : A long-neglected issue**

- Primary stress on constructing a body of regulation
- Spotlight turned on the causes for the relative ineffectiveness of a lot of instruments that had been adopted and the means to remedy it
- In international environmental law, has gradually emerged as a field of research in economics, political sciences and law, generating varied analyses, some more empirical, some more theoretical
- A wave of introspection extended beyond international law to European and national law.
- A great responsibility for environmental lawyers

## 2. Effectiveness: what is it?

- ‘effectiveness’: ‘the ability to be successful and produce the intended results’.

‘Efficacy’ : ‘the ability, especially of a medicine or a method of achieving something, to produce the intended result’

- Main question: does a rule or an instrument contribute to improve the environment or to achieve the intended policy objective ? In that sense, measuring the “effectiveness” of laws means measuring to what extent laws solve the problem they were designed to address.



the ultimate concern of legal rules and instruments.

## 2. Effectiveness: what is it?

- **The three levels of effectiveness**

- Legal effectiveness
- Behavioural effectiveness
- Problem-solving effectiveness

- **A phenomenon difficult to comprehend and explain**

- Is legal effectiveness spontaneous or due to an efficacious monitoring together with severe penalties?
- Is the rule respected because it is considered as good, justified or legitimate? Or is it by fear of possible sanctions?



A matter of fact & a symbolic dimension

## 2. Effectiveness: what is it?

- **A twofold condition for an instrument**

- to be well-designed (adapted to the purposes put forth; relevant)
- to be well-implemented (resulting in, proving capable of, a behavioral change)

- **Two separate but cumulative conditions**

- **Ineffectiveness is natural. Effectiveness is hardly total.**

*«C'est défigurer la réalité humaine et sociale qui s'exprime dans les systèmes juridiques modernes, que de n'en retenir qu'un besoin d'ordre, de régularité, partant de ponctuelle et totale effectivité des règles de droit. Il s'y rencontre des intérêts antagonistes : la propension au compromis, l'indulgence, et même la recherche du moindre effort, qui inclinent les règles de droit à une ineffectivité tout aussi naturelle» (Jean Carbonnier)*

## 2. Effectiveness: what is it?


### **Close terms with different meanings**


- Compliance
- Implementation
- Enforcement
- Efficiency




### 3. Difficulties in assessing effectiveness

- objectives not always clearly articulated,
- complexity of social and political structures,
- perpetual evolution of ecological systems,
- gaps of information
- appropriate indicators and adequate benchmarks still lacking
- difficulty of establishing causal links between the rule or instrument and the observed results...

 The chain of actions linking the rules, policies, the persons to the natural environment is complex, uncertain and discontinuous in a context marked by the existence of many overlapping policies and programs with similar intended outcomes.

 Assessing effectiveness is a multi-disciplinary task requiring the integration of environmental science and law.

 A value judgment?

## 4. How to improve the effectiveness of environmental law ?

- considering specificities of international law, European law or domestic law
- taking into account political, social and cultural deadlocks
- considering interconnections between better legislation and better implementation

**Two ways** : better legislation & better implementation

## Better legislation

- **the threats to the environment both complex and difficult to identify and deal with**

**Ex:** biodiversity as a complex, dynamic, evolving, and still widely unknown reality difficult to capture

**Ex:** interplays of planetary boundaries rarely captured by law

- **bad quality of norms** : often soft, vague, indeterminate, open-textured, non-quantified and, for a lot of international norms and some European norms, non-self-executing.

Designing “good” norms is not easy:



flexible but not too soft,  
evolving but not too much,  
combining incentive and coercive tools,  
general regulations and market-based approaches,  
public and private mechanisms...

# A better legislation

- **Main challenges:**

- ★ to determine on a case by case basis the best mix, the best combination between those different tools and approaches,

- ★ to find new ways to make law,

- ★ to strengthen expertise and the interface between experts and policy makers,

- ★ to experiment new approaches like participatory approaches, etc.

- **“better regulation” shall not be an excuse to deregulate.**

## Better implementation

- different issues arising from implementation of a classical tool (command and control) or a more innovative one (incentive tools, market-based mechanisms, voluntary tools...).
- a legal norm is not necessary a mandatory rule of conduct that can be only respected or violated.
- Sanctions not always the better tool of implementation: not always well-tailored/possible/decided.
- Because of the complex ways in which law is made meaningful in the life of its subjects, “*the law is ... not external, coercive and alien but internal, logically necessary and familiar.*” (Ian Brownlie).

Symbolic dimension: importance of legitimacy, acceptance

- Incentives more efficacious in some cases
- Sanctions and incentives ideally to be combined

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# Thanks



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